I also desire to draw attention to the fact that evidence was admitted of what one Teh Ah Bah said to the Police in his statement. This evidence should not have been admitted. Section 124 of the Criminal Procedure Code applies to all evidence of this kind whether tendered by the prosecution or by the defence and whether elicited in examination-in-chief or in cross-examination. The evidence thus improperly admitted does not affect my view as to what I should do in this particular case, but I would point out that the result of Counsel for the defence eliciting inadmissible evidence in cross-examination might well have been, in other circumstances, to compel me to order a fresh trial.

For the reasons I have given the appeal is dismissed.

Appeal dismissed.

CHIN KHING SIONG v. REX.

[App. Crim. Juris. (Spenser Wilkinson, J.) March 7, 1952]

[Penang — Criminal Appeal No. 7 of 1952]

Criminal trial — Complainant's evidence the only evidence against accused — Failure to produce complainant's report to the police at hearing of trial — Fatal — Not an irregularity under s. 448 of the Criminal Procedure Code—Evidence Ordinance, s. 114 illustration (g).

Where the evidence of the complainant is the only evidence against the accused, the failure to produce at the trial the complainant's report to the police raises a presumption that it would, if produced, have been unfavourable to the prosecution's case. Such an omission is not an irregularity that can be cured under section 448 of the Criminal Procedure Code.

Case referred to:—

(1) *Rex v. Cohen* 2 Cr. App. R. 207.

CRIMINAL APPEAL.

Khoo Eng Cheang for the appellant.

C. M. Sheridan (Federal Counsel) for the Crown.

The facts and arguments appear sufficiently from the judgment.

Spenser Wilkinson, J. : — This was an appeal from the decision of the Juvenile Court at Bukit Mertajam. The appellant was charged that on the 18th December, 1951 at about 9 a.m. he committed criminal trespass by entering the compound of house No. 622, Mukim 17, Pagar Tras, Machang Buboh with intent to commit theft.

Although the charge mentions 9 a.m. as the time of the alleged offence from the evidence it is clear that 9 p.m. was meant.

The complainant's story was that having heard his dog's bark he got up and looked out of his window and saw someone striking a match near his fowl house ten yards away. He then opened the door and went out and saw a male Chinese. The complainant shouted "thief!" and the male Chinese ran away. The complainant chased him for thirty yards. As he ran he found a bicycle on a small path and upon his finding the bicycle the person whom he was chasing turned back and claimed the bicycle. The male Chinese proved to be the appellant, who claimed the bicycle as his. Nevertheless, the complainant retained the bicycle (which, of course, he had no right to do) until the next morning, when he reported to the Police.

Apart from formal evidence of arrest, the evidence of the complainant was the only evidence against the appellant.

There were various grounds of appeal, but the main points which emerged from the arguments before me were whether there was sufficient evidence of intent to steal and whether there was sufficient evidence of actual trespass.

As regards the intent to steal, I was of opinion that the circumstances of the boy being seen striking a match in darkness near a fowl house and then running away when disturbed was sufficient evidence, if believed, upon which the Court could have inferred intention to steal. On the other hand the action of the appellant in returning and claiming his bicycle seems consistent with his running away having been due as much to innocent fear as to guilty intention. This point is not mentioned by the learned President in his grounds of decision.

As regards the actual trespass, the evidence is to my mind most unsatisfactory. In examination-in-chief the complainant did not state where the bicycle was found, though the inference from the way he told the story appears to me to be that it was at least thirty yards from the house. In cross-examination the complainant said: "You entered my compound", and in reply to the Court he said: "The bicycle was on a small path in my compound". No evidence was given as to what he meant by the expression "my compound", nor as to its extent, nor how it lay in relation to the public road or foot-path. The complainant may well have looked upon some of the land near his house as his compound, although he may not have been in legal possession of it.

The evidence for the prosecution on this point was thus, to say the least of it, very vague. In the absence, however, of anything else to cast doubt upon the complainant's evidence I would have hesitated to interfere with the decision of the learned President who had the advantage of seeing the complainant in the witness-box.

It was pointed out on behalf of the appellant, however, that the complainant having given evidence that he went to the Police Station the next morning and made a report, the report was not produced in evidence. In my opinion the failure to produce the report in this case was fatal to the prosecution case. If the report had told a story similar to that told by the complainant in the witness-box it would have been admissible in evidence under section 157 of the Evidence Ordinance. If the report did not support the complainant's story in the witness-box then he could have been cross-examined upon it under section 145 of the Evidence Ordinance. As, however, the report was not produced at all it appears to me that section 114 illustration (g) applies, and I must, therefore, presume that the report would have been unfavourable to the prosecution case. If this were so, the complainant's evidence would have been discredited, and the whole case for the prosecution would have fallen to the ground.

The Deputy Public Prosecutor conceded that the omission to produce the report was an irregularity and sought to rely upon section 448 of the Criminal Procedure Code. As, however, he also admitted that, as the case stood, the presumption was that the report would not have corroborated the complainant's evidence I do not think section 448 can assist him. Where, as in this case, the omission cuts at the root of the prosecution evidence, a failure of justice is occasioned, because the appellant has thereby "lost the chance, which was fairly open to him, of being acquitted" (see remarks of Channell, J. in *Rex v. Cohen*[1]).

For these reasons I set aside the Order of the Juvenile Court and acquitted the appellant and ordered that any costs paid under the Order of the Juvenile Court be repaid to the father.

Order accordingly.

ACHIAMAN ALAPAPAN & 2 ORS. v. REX.

[App. Crim. Juris. (Rogers, J.) March 15, 1952]

[Singapore — Magistrate's Appeal No. 185 of 1951]

Mental Disorders Ordinance, s. 56 — Charge of ill-treatment of Mental Hospital inmate — Misconduct of accused connected with inmate's suffering must be proved.

At 11 a.m. on 22nd September, 1951 the appellants, who were attendants at Woodbridge Mental Hospital, were seen to push an inmate from ward 3 to outside it; at that time the inmate was not violent, sad or crying. At 4.45 p.m. of the same day the inmate was found crying on the floor of ward 4. Extensive blue marks were found on the body, jaw and legs; such injuries could not have been self-inflicted and might have been caused several hours previously by the patient being dragged along the ground. The appellants were convicted of ill-treatment of the patient under section 56 of the Mental Disorders Ordinance.

Held, that to sustain a charge of ill-treatment the misconduct of the appellants must be connected with the inmate's suffering.

Case referred to:—

(1) *Reg. v. Pelham* 8 Q.B. 959.

MAGISTRATE'S APPEAL.

L. Rayner (Crown Counsel) for the Crown.

K. A. Seth and *N. N. Leicester* for the appellants.

Cur. Adv. Vult.

Rogers, J. : — In my opinion this appeal should be allowed, and I do so allow it. but because of the apparent importance of the matter to all those involved, and also because I do not lightly differ from so experienced a magistrate as Mr. Clague on a question of fact, I am giving my reasons at some length.

From the evidence called by the prosecution in this case it appears that about 11.00 a.m. on 22nd September 1951 an attendant at the Woodbridge Mental Hospital named Chintamany was outside Ward 2, and through the grill she could see these 3 appellants pushing an inmate along. It would appear that the pushing process began in the ward and was then continued outside, but it is not very easy to place the operation with accuracy, as the witness under cross-examination changed the story both as to her own position and as to that of the others. In answer to the learned magistrate this witness replied that the inmate was not violent when she was being pushed. She was not being very sad. The witness did not hear her crying, and there was no one else present.